Ng Neoh Ha & Ors v Maniam & Ors

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22-41-1991
KC VOHRAH J
11 DECEMBER 1993

Civil Procedure *— Trial — Submission of no case to answer — Made by two out of six defendants — Whether court should hear all the evidence before deciding on submission*

Civil Procedure *— Trial — Submission of no case to answer — Election by defendants not to call evidence — Whether defendants allowed to make final address — Whether cross-examination constitutes calling of evidence*

In these proceedings, the plaintiffs had closed their case. Counsel for the driver and the owner of the bus (the fifth and sixth defendants respectively), which was involved in a collision with two other vehicles, submitted that the fifth and sixth defendants had no case to answer. Counsel elected not to call evidence but submitted that since the evidence showed affirmatively that the fifth defendant was not responsible for the accident, the court should dismiss the case against him and the sixth defendant. Of concern to the court was that the evidence yet to be adduced by the other defendants could show otherwise. Should the court reject the 'no case' submission, the issues for the court's consideration were: (i) whether it meant that the court had then entered judgment against the fifth and sixth defendants before hearing the evidence of the other defendants; (ii) or whether the two defendants had the right to participate further though they could not call evidence; and (iii) if so, whether they could cross-examine the other defendants and their witnesses and make a final address.

Held, dismissing the no case submission:

(1) Although the plaintiffs' evidence showed that the fifth defendant was not responsible for the accident, all the defendants, except the fifth and sixth defendants, had pleaded that the bus was an obstruction. It was also pleaded by the first to fourth defendants as well as the plaintiffs that the fifth defendant was negligent in leaving the bus parked at the side of the road without any adequate signal or warning signs to users of the road. The court thus had to hear the evidence of the other defendants before a decision could be arrived at.

(2) Since the fifth and sixth defendants have elected not to call evidence, they were bound by the election. However, they must be permitted to make a final address. The court would have to hear the evidence of the other defendants and their witnesses and the full addresses (including that of the fifth and sixth defendants) before determining whether the plaintiffs had made out a case against any of the defendants.

A (3) As a general proposition, cross-examination would not constitute the calling of evidence and the fifth and sixth defendants were not precluded from cross-examining the other defendants and their witnesses.

B **[Bahasa Malaysia summary**

Dalam prosiding ini, plaintif telah menutup kes mereka. Peguambela pemandu dan tuan punya bas (defendan kelima dan keenam masing-masing), yang terlibat dalam suatu kemalangan dengan dua buah kenderaan lain, telah berhujah bahawa defendan kelima dan keenam
C tidak mempunyai kes untuk dijawab. Peguambela telah memutuskan supaya tidak memanggil keterangan tetapi berhujah bahawa oleh kerana keterangan menunjukkan defendan kelima tidak bertanggungjawab ke atas kemalangan itu, mahkamah sepatutnya membuang kes terhadapnya dan defendan keenam. Mahkamah khuatir bahawa keterangan yang akan dikemukakan oleh defendan yang lain mungkin
D menunjukkan sebaliknya. Jikalau mahkamah tidak menerima hujah 'tidak ada kes untuk dijawab', isu untuk pertimbangan mahkamah adalah: (i) sama ada ia bermakna bahawa mahkamah telah memasukkan penghakiman terhadap defendan kelima dan keenam sebelum mahkamah mendengar keterangan defendan lain; (ii) atau sama ada
E kedua-dua defendan itu mempunyai hak untuk mengambil bahagian selanjutnya walaupun mereka tidak boleh memanggil keterangan; dan (iii) jika ya, sama ada mereka boleh memeriksa balas defendan lain dan saksi mereka dan membuat ucapan muktamad.

Diputuskan, menolak hujah bahawa tidak ada kes untuk dijawab:
F (1) Walaupun keterangan plaintif menunjukkan bahawa defendan kelima tidak bertanggungjawab untuk kemalangan itu, kesemua defendan, kecuali defendan kelima dan keenam, telah mengemukakan hujah bahawa bas itu telah merupakan suatu halangan. Juga dihujahkan oleh defendan pertama hingga keempat
G serta plaintif bahawa defendan kelima cuai kerana meninggalkan bas itu di tepi jalan tanpa isyarat atau tanda amaran untuk pengguna jalan itu. Oleh itu, mahkamah terpaksa mendengar keterangan defendan lain sebelum membuat keputusannya.
(2) Oleh kerana defendan kelima dan keenam membuat pilihan supaya tidak memanggil keterangan, mereka diikat oleh pilihan itu.
H Bagaimanapun, mereka mesti dibenarkan membuat suatu ucapan terakhir. Mahkamah mesti mendengar keterangan defendan lain serta saksi dan ucapan penuh mereka (termasuk defendan kelima dan keenam) sebelum memutuskan sama ada plaintif telah membuktikan suatu kes terhadap mana-mana defendan.
I (3) Sebagai suatu kenyataan am, pemeriksaan balas tidak merupakan suatu pemanggilan keterangan dan defendan kelima dan keenam tidak dihalang daripada memeriksa balas defendan lain serta saksi mereka.]

Notes

For cases on the submission of no case to answer, see 2 *Mallal's Digest* (4th Ed) paras 2365–2372.

Cases referred to

1 *Simirah v Chua Hock Lee & Anor* [1963] MLJ 239 (refd)
2 *Hummerstone v Leary* [1921] 2 KB 664 (folld)
3 *Abu Bakar v Bear Singh* 1 JLR 117 (refd)
4 *Chop Chin Soon Heng v Chop Sin Hock Hin* [1952] MLJ 48 (refd)
5 *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4 (refd)
6 *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch) & Ors* 111 ALR 377 (folld)
7 *Lipman v Fox & London General Omnibus Co* (1911) 46 LJ 746 (folld)
8 *James v ANZ Bank* 64 ALR 347 (folld)
9 *Menzies v Australian Iron & Steel Ltd* (1952) 52 SR(NSW) 62 (refd)
10 *Mobil Oil New Zealand Ltd v Mathew Park Ltd* [1965] NZLR 803 (refd)
11 *Nesterczuk v Mortimore* [1965] 115 CLR 140 (refd)
12 *Trade Practices Commission v George Weston Foods Ltd (No 2)* (1980) 43 FLR 55 (refd)
13 *Trade Practices Commission v Allied Mills Industries Pty Ltd* (1981) 37 ALR 225 (refd)

S Visvanathan (*Sykt Visva*) for the plaintiffs.
Hasan Lah (State Legal Adviser) for the first and second defendants.
Lal Harcharan Singh (*LH Singh & Co*) for the third and fourth defendants.
Yeong Joo Kean (*Lim Kean Siew & Co*) for the fifth and sixth defendants.

Cur Adv Vult

KC Vohrah J: In these proceedings, the plaintiffs have closed their case. Cik Yeong, counsel for the driver and the owner of a bus which was involved in a collision with two other vehicles, has submitted that her clients have no case to answer. Relying on the practice advocated by Thomson CJ (as he then was) in *Simirah v Chua Hock Lee & Anor*,[1] she elected not to call evidence.

Citing *Hummerstone v Leary*[2] as authority, she also submitted that since the evidence showed affirmatively that the driver (the fifth defendant) was not responsible for the accident, the court should dismiss the case against him and also the owner of the bus (the sixth defendant).

During the course of arguments, I pointed out that the pleadings relating to the other defendants have blamed the driver of the bus either for being wholly or partly the cause of the accident involving the bus, a car and a lorry and posed the question whether it was not premature to dismiss the plaintiffs' claim against the fifth and sixth defendants until evidence is adduced from the other defendants. I was concerned that if the court were

A to give a decision in favour of the fifth and sixth defendants, meaning that, in effect, the court was holding that the driver of the bus was not liable for the accident, either wholly or partly, the evidence yet to be adduced by the other defendants could well show otherwise. On the other hand, if the court were to give a decision against the driver and the owner of the bus, the evidence yet to be adduced on behalf of the other defendants could well B show that the driver of the bus was not liable.

Encik Harcharan, counsel for third and fourth defendants, agreed that the court would be placed in a difficult position and Cik Yeong, relying on *Hummerstone*,[2] felt it was prudent for the court not to rule until all parties had been heard but she submitted that in this case, the evidence adduced C by the plaintiffs affirmatively showed that the driver of the bus was not to blame for the accident.

I also felt there were other matters which needed looking into. If the court should reject the 'no case' submission, it is clear that the driver and the owner of the bus, as defendants, cannot call evidence as they have elected to call no evidence. Does it mean that the court then enters D judgment against them before the court hears the evidence of the other defendants? Or do the said two defendants have the right to participate further in the proceedings although they cannot call evidence? If so, can they cross-examine the other defendants and their witnesses and can they make a final address?

E There are some reported local cases dealing with some practical aspects of procedure which would arise when the court rules either way on the submission of 'no case', viz *Abu Bakar v Bear Singh*,[3] *Chop Chin Soon Heng v Chop Sin Hock Hin*[4] and there is also the Singapore case of *UN Pandey v Hotel Marco Polo Pte Ltd*,[5] but none of them appears to deal directly with the latter procedural matters that I have raised.

F However, there has been considerable development on these aspects of procedure in Australia. A number of cases have been reported where practice matters relating to 'no case' submissions (which include some of the procedural matters mentioned in this case) have been raised and the case of *Hummerstone*[2] and other impinging English, Australian and New G Zealand cases have been considered. I think that what have been discussed and decided in these Australian cases provide good and practical guidance for me in dealing with this case.

Submission of no case where there is a single defendant

H As has been pointed out by French J in a case of the Federal Court of Australia, *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch) & Ors*[6] at p 379, as a general rule, and this is the practice also obtaining in this country, a single defendant will not be permitted to advance a submission at the close of the plaintiff's case that there is no case to answer unless an election is first made to call no I evidence. French J pointed out that where that course is taken, the judge's decision is made on the basis of all the evidence that is to be called.

Whichever way the judge decides, the decision is dispositive of the issues being tried between the plaintiff and defendant in that action. Where a

defendant is permitted to submit that there is no case to answer without being required to elect to call no evidence, then the judge's decision is dispositive of the case only if the submission is upheld. French J also observed that if the submission is not upheld then it is an interim decision that there is a prima facie case; the final decision must then await consideration of all the evidence including the evidence (if any) which may be adduced by the defendant.

Submission of no case where there are several defendants

Difficulties, however, arise when there are two or more defendants in an action for negligence and a submission of no case to meet is made by one of the defendants together with an election not to call evidence.

It has to be acknowledged that courts are reluctant to accede to a submission of no case to meet by one of several defendants. Two cases are illustrative of the matter, *Lipman v Fox & London General Omnibus Co*[7] and *Hummerstone v Leary*.[2] The case of *Lipman*[7] is discussed in the judgment of Bray J in *Hummerstone*.[2]

In *Lipman*,[7] the plaintiff claimed damages for negligence against either or both of two defendants. The Lord Chief Justice refused to dismiss the action as against the defendant company, although there was no evidence against the defendant company at the close of the plaintiff's case, because the evidence of the other defendant might, as it eventually did, raise a case against the company.

In *Hummerstone*[2] the plaintiffs were passengers injured in a collision between a motor lorry and a motor car and sued to recover damages for personal injuries alleged to have been caused by the negligence of both or one of the two defendants whom they sued jointly and in the alternative. The plaintiffs were passengers in the motor lorry which belonged to the first defendant, Leary. They alleged a collision in daylight between the lorry and the motor car belonging to the second defendant, Foster. They claimed that the driver of the car had endeavoured to pass the lorry in a narrow road, that the lorry overturned and that the plaintiffs were thrown out and injured. Their evidence appeared to make it probable that the driver of the car rather than the driver of the lorry was to blame, but the plaintiffs could not do more than state what they observed just before the lorry was upset. They did not affirmatively or conclusively prove that the defendant, Leary, was not liable. At the close of the plaintiffs' case, counsel for Leary submitted that there was no evidence against his client and that judgment ought to be entered for him. The county court judge agreed with that contention and entered judgment for Leary. The case then proceeded against Foster, who called the passengers in his car, who threw all the blame on Leary's driver. The learned judge then found that Foster's driving was not negligent and gave judgment accordingly. The plaintiffs, therefore, who on Foster's evidence had proved negligence against Leary, and might on Leary's evidence have proved negligence against Foster, failed against both. The plaintiffs appealed, and the Divisional Court (Bray and Lush JJ) granted a new trial, setting aside each judgement.

A Bray J read the judgment of the court and made reference to the then English Rules of the Supreme Court O 17 r 7 (see O 15 r 4 of the English Rules of the Supreme Court 1965, 1 *The Supreme Court Practice* (1991), Note 15/4/7 at p 183). The local O 15 r 4 of the Rules of the High Court 1980 is substantially similar to that rule. This is what Bray J stated at p 666:

B > In our opinion the learned judge took an entirely wrong course in allowing Leary to be dismissed from the action. Instead of trying the case as one entire case, which it was, and hearing all the evidence before arriving at a conclusion, he divided it into what we may call compartments and tried each separately, the result of which was that it was never really tried at all. He treated it as a claim against Leary alone and a claim against Foster alone, overlooking the fact that
C > the plaintiffs, as they were entitled to do under the Rules, were alleging that either Leary or Foster or both were responsible for the accident.

Bray J stated at p 667 that when once a state of facts was proved, as it was, from which the reasonable inference to be drawn was that, prima facie, one if not both drivers had been negligent, the plaintiffs were entitled to call on
D the defendants for an answer, and the proper time at which to decide whether on the evidence, one defendant or the other defendant or both the defendants were liable was at the close of the whole case.

There has been much discussion in Australian cases, inter alia, *James v ANZ Bank*[8] and *J-Corp Pty Ltd*,[6] as to what a court should do when there are two or more defendants, not all of whom seek to submit that there is no
E case to answer.

But before I go further, I think it is necessary to point out that there can be a submission of no case either in the sense that there is insufficient evidence adduced against a defendant at the close of the plaintiff's case or in the sense that by reason of some question of law, eg by reason of
F limitation of action, the case cannot succeed in any event against a defendant.

In both the cases of *James*[8] and *J-Corp Pty Ltd*,[6] there is no disagreement that where there is a submission of no case involving a question of law which can be divorced from findings of fact by the court, then the court (where such a submission is made) may entertain the submission.

There is, however, disagreement where the submission of no case is on
G an evidentiary basis and also where the submission of no case involves a question of law which cannot be divorced from findings of facts which will have to be made by the court. In *James*,[8] Toohey J was of the view that the court should not entertain either submission but should consider the evidence at the end of the hearing of the evidence. He said at p 406:

H > (1) I reject the no case submission made on behalf of the second and third respondents.
>
> (2) I do so on the ground that, in so far as the submission is based on lack of evidence or the unsatisfactory state of the evidence, it is inappropriate to entertain the submission when no similar submission has been made concerning the first respondent.
>
I > (3) In so far as the second and third respondents' no case submission is based upon propositions of law, these propositions cannot be divorced from the evidence in the case and from relevant findings of fact which can only be made at the close of proceedings.

He based his view on his reading of *Hummerstone*,[2] *Menzies v Australian Iron & Steel Ltd*,[9] *Mobil Oil New Zealand Ltd v Mathew Park Ltd*,[10] *Nesterczuk v Mortimore*,[11] and *Trade Practices Commission v George Weston Foods Ltd (No 2)*.[12]

French J in *J-Corp Pty Ltd*,[6] in disagreeing with the view of Toohey J, observed that in *Menzies*[9] the full court of the Supreme Court of New South Wales approved of the practice prescribed in *Hummerstone*[2] and said it should be followed in all cases where two or more defendants were joined under the provisions of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW). I pause here to note that s 2 of the said Act permits a plaintiff who is in doubt as to the person from whom he is entitled to redress to join two or more defendants so that the question as to which is liable, and to what extent, may be determined as between the parties. As observed by French J, in *Menzies*[9] the defendants were not joined as joint tortfeasors but the allegation was made against them that they were concurrently concerned in incidents out of which it was alleged that liability arose. The court in *Menzies*[9] said in regard to that at p 64:

> Such defendants, as in the present case, may be diametrically opposed in interest, each seeking to exculpate himself and to establish that the other defendant was the person solely responsible for the damage which has occurred. Under those circumstances it would seem that the ordinary rule, applicable in the case of a single defendant, is not an appropriate rule to follow where two defendants opposed in interest are concerned, and this has been so held by the Divisional Court in *Hummerstone v Leary* [1921] 2 KB 664.

As was pointed out by French J, the observations of the full court in that case addressed the practical difficulty of dismissing a defendant out of a case and leaving its co-defendant free to endeavour to shift the burden of notional liability onto its absent and now disinterested co-party. But French J observed that that was not to say that such considerations would operate with the same force in all cases and he relied on what Sheppard J said in *Trade Practices Commission v Allied Mills Industries Pty Ltd*[13] at p 231:

> An outstanding question which remains unresolved is what is to happen if I find a case to answer against some, but not all, respondents. The usual practice is not to dismiss a case against any respondent at that stage, but only to do that if there is still no case to answer against a respondent at the close of any evidence which may be led by the respondents against whom there is a case: *Menzies v Australian Iron & Steel Ltd* (1952) 52 SR(NSW) 62.

French J held that the question whether or not to entertain a no case submission by one of several respondents is, like the simple case of one respondent, a matter of proper case management having regard to the interests of justice, including convenience and economy in time and money. It is in essence one of practice within the general discretion of the court to regulate the conduct of the trial. With respect, I think the view of French J makes good sense and I would adopt his view.

The view of French J took into account what Bray J indicated in *Hummerstone*[2] at p 667:

A It must not be supposed from our judgment that if a plaintiff fails to make a prima facie case at all he is entitled to call on two defendants under such circumstances as these to give evidence and ask for judgment if no such evidence is given. He must of course prove facts from which in the absence of an explanation liability could properly be inferred. It might perhaps happen that a plaintiff suing two defendants in the alternative proved affirmatively that as
B regards one of them it is impossible to impute blame to him, and in that case, if such a case should occur, the judge would no doubt be entitled to dismiss him from the action.

Parties and nature of claim

C Counsel for the fifth and sixth defendants are relying on the above quoted passage from *Hummerstone*[2] to say that the court should dismiss the case against the fifth and sixth defendants. She is entitled to rely on it but the question is whether the evidence so far adduced justifies such reliance.

I would like to point out that after I had adjourned the case for consideration, I received a further written submission on the issue of
D negligence from counsel for the plaintiffs touching on the admissibility of some documents that were referred to in court earlier. Counsel for the fifth and sixth defendants, who was extended a copy of the written submission, had in a letter to the court, rightly pointed out that the said written submission was unsolicited. I do not wish to advert to that written submission
E as I think it would not be proper for the court to do so as the said counsel had already made his submission in court and he did not obtain the leave of the court nor the consent of all other counsel to submit the further submission.

As for the relevant evidence and pleadings pertinent to the no case submission, on 8 May 1980 at about 7pm, a collision took place between
F a car, a motor lorry and a motor bus along the Kuala Nerang–Alor Setar road. The car was proceeding towards Alor Setar and the lorry in the opposite direction and the motor bus was parked along the same side of the road the car was proceeding in.

The driver of the car and four of the five passengers in the car died as a
G result of the accident. The surviving passenger, the fifth plaintiff, was injured. He and the other plaintiffs, administrators of the estates of the four deceased passengers in the car, claim in para 14 of their statement of claim that the accident was caused by the negligence of the first defendant, the driver of the motor lorry, or, alternatively, by the negligence of the fifth defendant, the driver of the motor bus.

H What the plaintiffs allege against the driver of the bus is that he permitted the bus to become an obstruction and a danger to persons lawfully using the road when he left it there stationary without proper or adequate warning.

Each of the first, third and fifth defendants has denied liability and pleads that the collision was jointly or severally caused or substantially
I contributed to by the drivers of the two vehicles.

Three other defendants were sued; at the material time, the second defendant was the employer of the first defendant and owner of the lorry, the fourth defendant was the owner of the motor car and the sixth defendant

was the employer of the fifth defendant and owner of the bus and the second, fourth and sixth defendants each makes the same plea as the first, third and fifth defendants respectively.

Plaintiffs' case against fifth and sixth defendants

The only person who testified as to the manner in which the accident took place was the fifth plaintiff. He said it took place between 6 to 7pm. He was sitting in the front passenger seat of the car and he had a child with him. He saw a bus in front and he saw a dim light approaching and 'it was zig-zagging.' He said that as soon as he saw the light the accident took place and at the time of the accident the front portion of the car had passed the bus. He said that in regard to the bus (which was on the same side of the road the car was travelling) part of the bus was on the grass sidetable and part on the tarred road. Under cross-examination, he was asked by Cik Yeong, 'The bus was not obstructing the passage of the car?' His answer was, 'I agree.'

Submission of no case by fifth and sixth defendants

In her submission of there being no case to meet for her clients, Cik Yeong argued that the plaintiffs have failed to adduce any evidence to show that the fifth defendant, the driver of the motor bus, had breached his duty of care. She submitted that there was affirmative evidence from the fifth plaintiff that the bus was not obstructing the passage of the car and relied on what Bray J stated in *Hummerstone*[2] at p 668, as earlier adverted to,

> It might perhaps happen that a plaintiff suing two defendants in the alternative proved affirmatively that as regards one of them it is impossible to impute blame to him, and in that case, if such a case should occur, the judge would no doubt be entitled to dismiss him from the action.

I do not think, however, that the state of the evidence so far produced in this case is such that it is impossible to impute blame on the car driver. While the fifth plaintiff did not consider that the bus which was partly on the sidetable and partly on the tarred road was an obstruction, there was no positive evidence that the car in which the fifth plaintiff was travelling was travelling wholly on its side of the road or that the collision between the car and the approaching lorry took place on the car's proper side of the road. If there was such evidence, then it would be a valid inference that the bus did not pose an obstruction to the passage of the car along its side of the road. All the defendants, except the bus driver and owner of the bus, pleaded that the bus was an obstruction and until I have heard evidence from them, it is not possible to state that the evidence of the fifth defendant that there was no obstruction is affirmative and therefore conclusive.

It has also been noted that it is pleaded by the first to the fourth defendants (and the plaintiffs as well) that the fifth defendant was negligent in leaving the bus without any adequate signal or warning signs to users of the road and this has not been affirmatively disproved and here again, I

A would need to hear evidence adduced by the said defendants before a decision can be arrived at.

The no case submission must necessarily fail.

Procedural matters following from rejection of no case submission

B It is clear from the nature of the evidence which I have discussed that whether the fifth and sixth defendants were wholly or partly negligent in the case can only be decided after I have heard all the evidence in the case and that would mean considering also the evidence adduced by the other defendants in this case. Clearly therefore, entering judgment for the plaintiffs against the fifth and sixth defendants at this stage cannot arise.

C Since the fifth and sixth defendants have elected not to call evidence, they are bound by the election. The court will have to hear the evidence of the other defendants and their witnesses and the full addresses before determining whether the plaintiffs have made out a case against any of the defendants. As pointed by Toohey J in *James*[8] at p 403, it was implicit in his

D view that the defendants who elected not to call evidence must be permitted to make a final address and they 'can hardly be precluded from doing so since all they have sought to do is to argue that they had no case to answer'.

Are the fifth and sixth defendants precluded from cross-examining the other defendants (should they decide to give evidence) and their witnesses? Again with respect, I agree with the view of Toohey J that, as a general

E proposition, the cross-examination would not constitute the calling of evidence though it is conceivable that an issue may arise as to whether an answer to a particular question or the production of a document to a witness may constitute adducing evidence but such matters can be dealt with, if necessary, if they do arise during the course of the trial.

F Considering the foregoing, I reject the no case submission made on behalf of the fifth and sixth defendants.

Submission dismissed.

Reported by Kevin Ooi

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